No. 13077

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Radiophone Corporation, Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

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We have received the answering brief of the appellee and deem it essential that we reply thereto.

Analysis of Appellee's Brief.

It is respectfully urged that the appellee's brief submitted herein, in its entirety, completely ignores the various House and Senate Committee reports (Collier on Bankruptcy, 14th Ed., Vol. 8, P. 1013, N. 43, Analysis of H. R. 12889, 74th Cong., 2nd Sess. (1936) 180; H. R. 1409, 75th Cong., 1st Sess. 1937; Sen. Reports 1916, 75th Cong., 3rd Sess., Calendar No. 2022 (1938)), cited by appellant (App. Br. pp. 10 to 14), which do positively demonstrate that the intent of Congress behind its amendments of, and addition to the Bankruptcy Act in 1938, was to the end *that the United States, its officers, agents*

and bureaus, as a claimant be placed on a parity with and subjected to the same requirements as other claimants and be bound by section 355 of the Bankruptcy Act.

In particular, the court's attention is directed to the following general phases of the appellee's brief, together with the appellant's comments thereon:

I.

The appellee (Br. pp. 8 to 12) theorizes that since section 57-n refers to "all claims of the United States," that section 355, which does not specifically mention the United States, is not and cannot be an exception to section 57-n.

A. The appellee's emphasis on that portion of section 57-n which provides for "all claims of the United States" (Br. p. 10), is made in an attempt to demonstrate that no section of the Bankruptcy Act, other than 57-n, can possibly be applied or considered in determining whether or not its claim is timely filed. However, the appellee conveniently overlooks and fails to consider the opening phrases of section 57-n in their entirety, which provide: "Except as otherwise provided in this Act, *all claims provable under this Act, including* all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. . . ." (Italics added.) From this it can be readily observed that Congress intended that *all claims,* whether or not held by general creditors, prior labor claimants, or the government, because of some tax or contract obligation, shall and must be filed as per the provisions of section 57-n, it being

specifically provided therein, however, that the said section might be modified by a provision found elsewhere in the "Act." What other reason could Congress have had for commencing this section (57-n) with the words—*"Except as otherwise provided in this Act"?* We are left with no alternative but to consider section *355* as one of the exceptions referred to by section 57-n. The said sections must, of necessity, be read and construed together to the end as previously set forth by the appellant (App. Br. p. 25), that: EXCEPT IN THE SITUATION COVERED BY SECTION 355 WHEREIN A THREE MONTH PERIOD WILL PREVAIL, ALL CLAIMS PROVABLE UNDER THE BANKRUPTCY ACT, INCLUDING THOSE OF THE UNITED STATES OR ANY STATE OR SUBDIVISION THEREOF, SHALL BE PROVED AND FILED WITHIN SIX MONTHS AFTER THE FIRST DATE SET FOR THE FIRST MEETING OF CREDITORS AS PROVIDED IN SECTION 57-n.

B. Contrary to the appellee's contention (Br. p. 11), in construing sections 57-n and 355, as heretofore done by the appellant (App. Br. pp. 23 to 26), there is no need to specifically mention the United States in section 355, as it has already been expressly mentioned in the *general* provision for the filing of claims, section 57-n. Section 355 is merely a modification of, or an exception to, this *general* provision.

C. Further, the appellee emphasizes that portion of section 57-n authorizing the United States to petition for an extension of time in which to file its claim (Br. pp. 11 to 12), concluding that this proviso prevents section 355 from applying to the United States. However, here again the appellee is attempting to isolate section 57-n from the other sections of

the Bankruptcy Act. In so doing, it is completely ignoring the "Except as otherwise provided in this Act" provision of the said section and does also completely disregard the rules of statutory interpretation which provide that every section, subsection and provision of a statute should be construed together in order to ascertain the true legislative intent. (See App. Br. pp. 7 to 9; *West v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098 (1899), 19 S. Ct. 839.)

D. The appellee refers the court to sections 3466 and 3467 of the Revised Statutes and section 3661 of the Internal Revenue Code as support for its position that only section 57-n, which specifically mentions the United States, is binding upon it. (Br. p. 12.) The first two of the said sections (3466 and 3467) referred to by the appellee provide that obligations due the United States by a debtor must be paid prior to obligations to other creditors. The latter section (3661), provides that a person required to collect or withhold any revenue tax from another person, holds the said funds in trust for the United States. Actually, these sections serve to confuse, rather than clarify the problem herein presented, as they have nothing whatsoever to do with the Bankruptcy Act. Section 64 of the said Act, controlling in all bankruptcy proceedings, repudiates these sections and places all taxes (including those due the United States), in a fourth order of priority. Other debts due the United States are placed in a fifth order of priority. (Sec. 64-a(4) (5).)

In concluding this, the first phase of its brief, the appellee remarks that the appellant has cited no "authority" for his contention that Congress in-

tended the three month period of section 355 to entirely replace the six month period of section 57-n (Br. p. 12). It is to be noted that the appellant's statement to this effect (App. Br. p. 14), is actually a quotation from Collier on Bankruptcy, 14th Ed. (1940), Vol. 8, p. 1017, which is based upon an Analysis of H. R. 12889, 74th Cong., 2nd Sess. (1936) 180, found in the same volume of Collier, p. 1013, n. 43.

In Webster's 20th Century Dictionary, "authority" is defined: "7. In law, a precedent or decision of a court; an official declaration; an eminent opinion or saying; anything calculated to influence the opinion of others, as the decision of a higher court."

We do not believe that (up to the instant time) the particular point here presented has been fully considered by any court, and, most certainly, upon the decision herein there will be ample "authority," the lack of which now concerns the appellee.

II.

The next phase of the appellee's brief is to the effect that the legislative history of sections 57-n and 355 does not indicate that the United States of America, its officers, agents and bureaus, as claimant, should be bound by section 355 of the Bankruptcy Act. (Br. pp. 12 to 14.)

A. Here (Br. pp. 12 to 13), the appellee refers to the provisions of section 57-n as being "so clear, unambiguous and free from doubt" that resort to legis-- lative history and statutory interpretation is unnecessary. Again, the appellee has refused to consider the Bankruptcy Act as a whole, but rather, has focused attention on the isolated provisions of sec-

tion 57-n and even then, only to a portion of its provisions. However, when we consider its opening phrase: "Except as otherwise provided in this Act," certainly then, we must consider the construing of section 57-n together with any exception or modification thereto, such as section 355, in a factual situation such as herein presented. Are these opening words of the said section to be overlooked and considered mere window dressing, or are they to be considered a part of the section and given a meaning?

B. With respect to the appellee's contention that nothing in the legislative history referred to by the appellant "directly or indirectly" indicates an intention upon the part of Congress, that the United States, its officers, agents and bureaus, as a claimant, be bound by section 355 of the Bankruptcy Act (Br. p. 13), it is respectfully submitted that further consideration be given to Appellant's Opening Brief, particularly pages 10 to 14, inclusive.

C. In referring to section 57-n which emphasizes "all claims of the United States" as a "special" provision governing the filing of claims, which must prevail over a "general" provision such as section 355 (Br. p. 13), it becomes apparent that the appellee must, at least, be slightly confused.

How section 57-n, which provides—"Except as otherwise provided in this Act, *all claims provable under this Act, including* all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section * * *," (italics added) may be considered a "special" provision governing the filing of claims in bankruptcy proceedings, with section 355, being

considered a "general" provision, when it merely governs the filing of claims in an isolated set of circumstances which are the exception rather than the rule in bankruptcy proceedings as a whole, is not conceivable.

Certainly, if the "special" provision is to prevail, as emphatically asserted by the appellee (Br. p. 13), then by its own admission, the United States, its officers, agents and bureaus, as a claimant, is and must be bound by the "special" provisions of section 355, which is one of the exceptions referred to in the opening phrase of section 57-n—"Except as otherwise provided in this Act * * *."

D. The logic of the appellee is even more questionable when it asserts that if Congress intended that the United States be bound by section 355 *instead* of section 57-n, it would have specifically mentioned the United States in the former section rather than the latter (Br. p. 13). Here again, the appellee persists in its steadfast refusal to construe together the pertinent sections of the Bankruptcy Act pertaining to the filing of claims, namely, sections 57-n *and* 355. The appellant, however, in harmoniously construing the said sections (App. Br. pp. 23 to 25), unequivocally demonstrates that not one, but both of the said sections apply to the United States, and that the sole and entire purpose served by section 355 is to modify the six month provisions of section 57-n under certain circumstances, to one of three months, with all of the other provisions of the latter general section remaining undisturbed.

E. In the matter of statutory interpretation, the appellee has stated that the rules pertaining thereto are not applied where there is no ambiguity, and that in the situation before the court there is no need for a *liberal* or *strict* construction. (Br. p. 13.) However, further along in its argument (Br. p. 14), the appellee *demands* that the court *strictly* construe section 57-n (not sections 57-n *and* 355), as it imposes a limitation upon the claims of the United States. Are not these statements of the appellee inconsistent and contradictory?

F. In concluding this argument relative to the legislative history herein involved, the appellee insists that the appellant's construction of the sections in question, 57-n and 355, reduces the words "all claims of the United States" to "meaningless" and "empty declarations." (Br. p. 14.) It is submitted that in steadfastly refusing to acknowledge the existence of the opening phrase of section 57-n, "Except as otherwise provided in this Act," and further, in refusing to acknowledge the relationship of the phrases, "all claims provable under this Act, *including* all claims of the United States * * *" (italics added), the appellee is overlooking, or ignoring, words that do have a meaning and a purpose, that must, of necessity, be considered in any interpretation of the sections involved. The words "*including* all claims of the United States" (italics added), are merely a specific enumeration of certain claims included in "all claims provable under this Act," and as such, are referring to tax claims as well as any and all other debts that might be due and owing the United States as a claimant. As an analysis of sec-

tion 57-n demonstrates, the words therein, "*including* all claims of the United States" (italics added), do not direct that the claims of the United States, whether provable in regular bankruptcy proceedings or in Chapters X, XI, XII and XIII proceedings, must be filed within the six month period after the first date set for the first meeting of creditors, but rather, that the words "*including* all claims of the United States" (italics added), are merely a specification of certain claims included in the sections preceding phrase "all claims provable under this Act," and as such, bound by the provision, "Except as otherwise provided in this Act."

It is to be noted that in the opening phrase of section 57-n, the authors of the law refer to the "Act," *not* to this or that *Chapter* of the "Act." Certainly then, it is the appellee, not the appellant, who is reducing the provisions of sections 57-n and 355 to "meaningless" and "empty declarations."

G. Purpose of 1938 Amendment.—When the Bankruptcy Act was recast in 1938 the legislature was determined to bring the ever growing list of tax claimants "into line." That is, to require both in the interests of uniformity, and also expedition and economy of administration, that the tax claimants come forward and assert their claims in the same manner as any other creditor, with one exception, *i. e.,* the right to an extension of time if applied for within the statutory period.

This new casting of the law was an innovation. Instead of costly, laborious, slow and uncertain processes of the bankruptcy court "searching out" the

tax claims, it required that these claims be brought forward by the claimants in the same way as any other creditor.

The change was long overdue. So, when the new Act was cast, because of the adverse case law on the subject, there was added to section 57-n the positive declaration, "*including* all claims of the United States * * *." (Italics added.)

Under Chapter XI it is not mandatory that claims be filed in order to participate under the Plan of Arrangement.

However, on the other hand, when a Chapter XI proceeding fails and "ordinary bankruptcy" is resorted to, then all of the rules of "ordinary bankruptcy" apply, with very few exceptions, one of these being that the time for filing claims, if it has not already expired, is shortened to a period of three months. (Sec. 355.) This 1938 amendment was a logical, common sense proposition, and follows somewhat the new idea of expedition in bankruptcy administration. Why wait a six month period for the filing of claims in a proceeding which might possibly have been already pending for several months. Since 1938, practical experience has shown that the three month period is more than adequate when the proceeding changes from a Chapter XI to ordinary bankruptcy liquidation. Why take more time and incur more expense? And, especially, why should not the taxing agencies be included in the same class as other creditors and treated in the same manner?

III.

The third phase of the appellee's argument is devoted to the proposition that the problem herein presented is controlled by the case of *New York v. Irving Trust Co.,* 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815 (Br. pp. 14 to 16).

A. In clinging to this proposition, the appellee refuses to recognize that the Bankruptcy Act was amended and supplemented in 1938, and that thereby, the claims of the United States were placed on a parity with other claimants except as to the allowance of additional time, upon request, in which to prepare and file its claim.

B. The appellee entirely disregards the rules of statutory interpretation considered by the appellant (App. Br. p. 8), to the effect that:

1. Later amendments to a statute cannot be ignored in the construing thereof.

Summers v. Collector of Taxes (C. C. A. 8th Cir., 1937), 92 F. 2d 819.

2. When a change is made in phraseology in the reenactment of a statute, it gives rise to a presumption of a change of intent on the part of the legislative body, from that expressed in the former statute.

Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 25 S. Ct. 9.

C. Nor does the appellee consider that rule of statutory interpretation requiring modification of the principle expounded by the court in the *Irving Trust*

case, in a situation where the demands of a contrary public policy include the government within the principle and intendment of the statute, which here, is the expediting of the administration of bankrupt estates, the eliminating of controversies as to the effectiveness of bar orders as to the United States, and the placing of all claimants on a parity. (App. Br. pp. 21 to 22; *Fink v. O'Neil,* 106 U. S. 272, 27 L. Ed. 196, 1 S. Ct. 325.)

IV.

The final phase of the appellee's argument (Br. pp. 16 to 18) is devoted to extensive quotations from the case of *In re Marine Stevedoring Corp.* (C. C. A. 3rd, 1948), 169 F. 2d 554, together with cases on which the said decision is based.

A. As for the appellee's statement that the cases to which it refers negative the appellant's contentions (Br. p. 18), it is submitted that such a statement may well be found by this court to be in error. Where, in any of the cases cited by the appellee, do the indicated courts:

1. Consider the rules of statutory intention involved where an amendment is made to an existing statute, indicating a change in legislative intent. (App. Br. pp. 7 to 9.)

2. Give regard to the intent of the legislature as evidenced by the various House and Senate Committee reports cited by appellant (App. Br.

pp. 10 to 14), wherein it was *expressly stated* that the 1938 amendments to the Bankruptcy Act were designed to expedite bankruptcy administration, do away with the controversies concerning bar orders directed against the United States, and subject the government to the same requirement as other claimants in the filing of claims. Nor was consideration given to the express admonition of these same Congressional Committees that these reasons were to be considered in the construing of the provisions of Chapters X, XI, XII and XIII as to the filing of claims.

3. Consider the expression of the Supreme Court of the United States in the case of *City of New York v. Saper,* 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554 (App. Br. p. 14), to the end that:

> "*Tax claims are treated the same as other debts* except for the fourth priority of payment." (Emphasis added.)

4. Consider the illogical and unintended result which places the United States in a less advantageous position than that of other creditors, when we extend to its logical conclusion the rule laid down in the *Marine Stevedoring* case, in a factual situation wherein a Chapter XI petition is filed in a regular bankruptcy proceeding five months after the original petition was filed, with the said Plan being rejected three months later and an order of

adjudication immediately following. The results—the general creditors have three months to file a claim; the United States is unable to file a claim because the six month period of section 57-n has lapsed. (App. Br. pp. 18 to 20.)

5. Consider a possible modification of the principle set down in the *Irving Trust* case because of a contrary public policy and intent as hereinbefore mentioned (App. Br. pp. 21 and 22), which principle was adhered to by this court in the case of *In re Knox-Powell-Stockton Co.* (1939), 100 F. 2d 997; or, consider the possibility of a change of legislative intent because of the 1938 amendment to the Bankruptcy Act. (App. Br. pp. 21 to 22.)

6. Even attempt to logically construe the only two pertinent sections relating to the filing of claims in the factual situation herein presented, sections 57-n and 355 *(not 57-n and 378, sub. 2),* as done by the appellant (App. Br. pp. 23 to 25), wherein he concluded that—EXCEPT IN THE SITUATION COVERED BY SECTION 355 WHEREIN A THREE MONTH PERIOD WILL PREVAIL, ALL CLAIMS PROVABLE UNDER THIS ACT, INCLUDING THOSE OF THE UNITED STATES AND ANY STATE OR SUBDIVISION THEREOF, SHALL BE PROVED AND FILED IN THE MANNER PROVIDED IN THIS SECTION, TO WIT, CLAIMS NOT FILED WITHIN SIX MONTHS AFTER THE FIRST DATE SET FOR THE FIRST MEETING OF CREDITORS SHALL NOT BE ALLOWED.

Conclusion.

It is respectfully submitted that the appellee has failed to refute any of the arguments offered by the appellant and that the order of the District Court be reversed and the claim of the Collector of Internal Revenue, which was not filed within the period set forth in section 355, be disallowed.

Respectfully submitted,

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